SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952 1953

No. 66722

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, A CORPORATION,

Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, AND CITY OF LOS ANGELES, A MUNICIPAL CORPORATION

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

The Public Utilities Commission of the State of California, respondent and appellee (hereinafter referred to as Commission), for its statement in opposition to statement as to jurisdiction herein of The Atchison, Topeka & Santa Fe Railway Company, petitioner and appellant (hereinafter referred to as Santa Fe), and in support of said Commission's motion to dismiss or affirm, respectfully shows the following:

I. Statement of the Facts

Santa Fe, an intrastate and interstate common carrier of freight and passengers by rail and/or motor vehicles

operating between points in California, including the City of Los Angeles, crosses certain streets and highways of said State, including Washington Boulevard in said City.

The Commission is a constitutional body having regulatory jurisdiction over all public utilities including railroads and other transportation companies, with the exclusive power and duty to allocate costs of grade crossing separations. (Sections 17, 19-23a of Article XII of the Constitution of California; the Public Utilities Act and the Public Utilities Code of said State, Statutes 1915, Chapter 91, as amended, and Statutes 1951, Chapter 764, as amended, respectively.)

The authority of this Commission to allocate costs in this matter stems primarily from Section 1202 of the Public Utilities Code (California Statutes 1951, Chapter 764, as amended) from which we quote:

"1202. The commission has the exclusive power:

"(a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or vice versa, subject to the provisions of Sections 1121 to 1127, inclusive, of the Streets and Highways Code so far as applicable.

"(b) To alter, relocate, or abolish by physical closing any such crossing heretofore or hereafter established.

"(c) To require, where in its judgment it would be practicable, a separation of grades at any such crossing heretofore or hereafter established and to prescribe the terms upon which such separation shall be made and the proportions in which the expense of the construction, alteration, relocation, or abolition of such

crossings or the separation of such grades shall be divided between the railroad or street railroad corporations affected or between such corporations and the State, county, city or other political subdivision affected." (Former Sec. 43(b), 1st sent.)

That on the 4th day of June, 1948, the City of Los Angeles filed its Application No. 29396 with the Commission, seeking authority to enlarge two 20-foot underpasses on Washington Boulevard below petitioner-appellant Santa Fe's four tracks. After public hearing and briefing, the Commission, by its Decision No. 43374 dated October 4, 1949, authorized the City to enlarge the underpasses further providing that the expense thereof was to be borne by the City, with the exception of the sum of $95,160 which was to be paid by Santa Fe. On November 22, 1949, the City filed a petition for rehearing, and on December 2, 1949, Santa Fe filed a petition for rehearing.

Thereafter, a rehearing was granted March 28, 1950, and public hearings were held thereon, followed by opening, closing and reply briefs, including oral argument, on November 28, 1951, before the Commission *en banc*.

On June 24, 1952, the Commission rendered its Decision No. 47344, herein assailed, authorizing the City of Los Angeles to widen and increase the height of the existing underpasses of Washington Boulevard and the Harbor Branch Line and the main line railroads of Santa Fe in keeping with the adopted plans and specifications therein, subject to the following condition:

"Fifty percent (50%) of the costs of the proposed structures attributable to the presence of the railroad tracks, as defined in the foregoing opinion, excluding the costs attributable to the paving and widening of the street, shall be borne by The Atchison, Topeka & Santa Fe Railway Company, and the remainder of the

costs shall be borne by the City of Los Angeles" (51 Cal. P.U.C. 771, 783).

A comprehensive recital of pertinent facts surrounding the governing factual and legal principles is embraced within the Commission's orders comprising the Appendices to Appellant's Statement as to Jurisdiction herein, hence not here further repeated.

It was the position of the City that the Railroad should pay that portion of the cost which is attributable to the presence of the railroad tracks.

It was the position of Santa Fe that the costs should be allocated according to benefits received and since it disclaimed any benefits to the railroad, said Santa Fe would contribute nothing.

The Commission, in adherence to the entire record and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that "In apportioning the costs of constructing these separations between applicant [City of Los Angeles] and the railroad company [Santa Fe], due consideration should be given to the obligations of each party, as well as to the benefits derived," explaining as follows:

> "The authority of this Commission to allocate costs, as designated in Section 1202 of the Public Utilities Code, supra, is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion. (*Erie Railroad Company* v. *Board of Public Utility Commissioners*, 1920, 254 U. S. 394, 65 L. Ed. 322; *Chicago, Milwaukee and Saint Paul Railway Company* v. *Min-*

neapolis, 1914, 232 U. S. 430, 58 L. Ed. 671; *Missouri Pacific Railway Company* v. *Omaha*, 1914, 235 U. S. 121, 59 L. Ed. 157; *Lehigh Valley Railroad Company* v. *Board of Public Utility Commissioners*, 1928, 278 U. S. 24, 73 L. Ed. 161)." (Also *Cincinnati, I. & W. R. Co.* v. *Connersville* (1916) 218 U. S. 336, 54 L. Ed. 1060; *State ex rel. Alton R. Co.* v. *Public Service Commission, Mo.* (1934), 70 S. W. (2d) 57, 60; *Northern Pacific R. Co.* v. *Minnesota ex rel. Duluth* (1907), 208 U. S. 583, 52 L. Ed. 630; *Penn.-Reading S. Lines* v. *Bd. of P. U. C. Com., etc.* (1951), 81A (2d) 28; Affirmed, 82A (2d) 774.)

II. Statement of Issues on Appeal

As purported, in brief: That Commission Decision No. 47344, dated June 24, 1952, prescribing a 50% cost allocation apportionment for Washington Boulevard railroad crossing improvement as between the City of Los Angeles and Santa Fe, would deprive petitioner-appellant of (1) property without due process and (2) of equal protection of the laws and (3) impose an undue and unreasonable burden on interstate commerce.

III. No Substantial Federal Question Is Presented by the Attempted Appeal

The matters herein readily resolve to the single basic question raised by Santa Fe on its appeal to the United States Supreme Court as confirmed in the last-page conclusion of its Jurisdictional Statement; namely, whether or not the so-called *Nashville* case (*Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 79 L. Ed. 949) applies to the instant case at bar.

The Commission, in apportioning the costs of constructing the instant grade separation changes as between the City and Santa Fe, gave due consideration to the obligations of each as well as to the benefits derived (51 Cal. P. U. C.

771, 781) (Appendix B to Appellant's Statement as to Jurisdiction).

We have uniformly contended that the *Nashville* case is no authority for the inference by Santa Fe that the law has now been changed so that railroads cannot be required to pay the costs of grade separations.

As was stated by the Honorable Supreme Court of the United States in the *Nashville* case (p. 964):

> "* * * No case involving like conditions has been found in any of the lower Federal courts, nor, excepting the case here under review, has any such been found among the decisions of the highest courts of any state."

This makes it abundantly clear that the Supreme Court of the United States did not intend that the *Nashville* case should be considered as reversing the long line of prior cases setting forth the railroads' continuing responsibility in connection with grade separations.

Furthermore, Santa Fe, in urging the overthrow of the well-established law of the land in favor of a single unique and distinguishable case—the *Nashville* case, fails to differentiate the latter under statutory requirement when Federal-aided highways are concerned in that no railway involved in a grade-crossing project, constructed in whole or in part from Federal funds, may be required to contribute other than in accordance with the benefits which it shall receive (Federal Aid Highway Act of 1944, 58 Stat. L. 838-841). Washington Boulevard crossing is not a Federal-aid project and no such qualifications have been or are in anywise applicable thereto.

It will be instantly appreciated how the so-called *Nashville* case is wholly dissimilar, both as to governing facts and applicable law, from the instant Washington Boulevard grade separation case, and that the two fundamentally different situations are in no wise comparable, since, as the

record will show, the two separate highways and the two widely separated crossings there involved (being a quarter of a mile or more apart) are separately operated today just as heretofore.

Again, Santa Fe is highly inconsistent in disclaiming numerous benefits and advantages which, as set forth in the assailed decision, inevitably would accrue to it and to its highway-carrier subsidiaries from the Washington Boulevard improvement, including among others newly standardized structures in lieu of outmoded and heavily depreciated 40-year old structures. Washington Boulevard crossing is of impaired clearances, both as to height and width.

And there is no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, the element of direct benefit is absolutely immaterial. As stated by the Commission, it is one of the factors for consideration but not necessarily the controlling factor.

That the motivating purpose is and the obvious result of Santa Fe's instant attack would be the ultimate defeat, through prolonged and futile negotiations, of any and all future grade separation relief owing to the highly controversial character of the impracticable benefits theory which it here seeks to obtain.

Mindful of the history of Commission grade crossing procedures, it is doubly apparent that the appellant's rail benefits theory here urged would be a perversion of grade crossing regulation as it exists in California and would virtually nullify the present constitutional and statutory mandates for the protection of the public interest under the exercise of the police powers of the State of California.

We steadfastly contend that the orders of the Commission constitute a valid and reasonable exercise of the police power without impairment of any obligation or right whatsoever of Santa Fe, and we deny that the Commission in thus exercising the police power of the sovereign State herein on behalf of the public safety, welfare, convenience and necessity acted arbitrarily or otherwise failed to regularly pursue its lawful authority, or that it acted in excess of its jurisdiction, or that it wrongfully deprived petitioner-appellant [Santa Fe] of rights or property without due process of law, or that it has denied the petitioner the equal protection of the laws in violation of the Constitution of the United States, or that it has taken action which results in undue burdens upon interstate commerce or that its order impinges on the National Transportation Policy of the Congress. (*South Carolina State H. Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 189, 82 L. ed. 734, 741; *Panhandle Eastern Pipe Line Co.* v. *Michigan Pub. Serv. Com.*, 341 U. S. 329, 333, 95 L. ed. 993, 998. *Alabama P. S. Com.* v. *Southern R. Co.*, 341 U. S. 341, 95 L. ed. 1002; *North Carolina* v. *United States*, 325 U. S. 507, 511, 89 L. ed. 1760, 1765.)

This premature and ill-advised appeal by Santa Fe seems born of its anticipatory fears for the future respecting imaginary, but non-existent, legislation whereby it has wholly misconceived or utterly ignored the practicalities of the instant situation and erroneously asserted claims to the existence of a Federal question without any actual foundation therefor. For, while as stated by Justice Holmes in the *Erie Case*, supra,—"That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights" (254 U. S. 410, 65 L. ed. 333), in the more than 40 years of such regulation by this Commission, during which its grade crossing apportionments to the numerous railroads of this State

have ranged variously from zero % to 100%, the official history of such regulation in California affords no grounds for any such fear or implication as petitioner-appellant would infer.

And as stated by the Honorable Supreme Court of the United States, speaking through Chief Justice Vinson, "* * * It is now well settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved." (*Alabama-P. S. Comm.* v. *Southern R. Co.*, supra, citing cases.) (*N. Y.*, v. *U. S.*, 331 U. S. 284, 334-336.)

IV. Conclusion and Motion to Dismiss or Affirm

We therefore respectfully submit that the questions presented in this appeal have long ago and repeatedly since been so definitely determined that no substantial Federal questions are presented by this appeal entitling Santa Fe to invoke the jurisdiction of the Supreme Court of the United States.

WHEREFORE, appellee and respondent respectfully moves that the within appeal be dismissed or that the orders of the Supreme Court of the State of California and the decision and order of the Commission be affirmed.

Dated: San Francisco, California, March 12, 1953.

Respectfully submitted,

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